Supreme Court, U.S.
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In The

Supreme Court of the United States

SAUL GREGORIO MARTINEZ,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. On a question that has divided the circuit courts, whether a false statement that does not go to the heart of an alien's operative asylum application, made before the effective date of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005), automatically disqualifies an asylum applicant from relief.

2. On a question that has divided the circuit courts, whether an adverse credibility determination, made with regard to an alien's asylum application, automatically disposes of an alien's separate claim under the Convention Against Torture, 8 C.F.R. § 208.16(c)(2).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at *Martinez v. Holder*, 557 F.3d 1059 (9th Cir. 2009) ("*Martinez*"). A copy of this opinion is included at Appendix 1-17. The pertinent underlying decision of the Board of Immigration Appeals ("BIA") is included at Appendix 18-21. The United States Court of Appeals for the Ninth Circuit denied rehearing and *en banc* review on September 8, 2009. A copy of this order is included at Appendix 22.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254.

REGULATORY PROVISION INVOLVED

> The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

8 C.F.R. § 208.16(c)(2).

STATEMENT OF THE CASE

Petitioner Saul Gregorio Martinez ("Martinez") is a 45-year-old gay man from Guatemala. Because of his sexual orientation: (1) the Guatemalan police physically assaulted him on two occasions and sexually harassed him on one occasion; (2) a Guatemalan Congressman raped him; and (3) the wife of that Congressman hired henchmen to locate, detain and beat Martinez. Martinez fears for his life and safety if he returns to Guatemala because both the Congressman and the Congressman's wife have threatened to harm him again. There is no dispute in the record about these facts.

Martinez fled Guatemala and arrived in the United States on May 14, 1992. With the assistance of a "notario," he filed an application for asylum and withholding on September 21, 1992.[1] Martinez's original asylum application inaccurately stated that Martinez had been the victim of persecution because of his political beliefs. The application did not contain information about the persecution that Martinez experienced on account of his sexual orientation. Martinez's original application was prepared to fit within the then current guidelines for permitting asylum.

Persecution based on sexual orientation was not a valid basis for requesting asylum in 1992, when

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[1] A "notario" is an individual who assists immigrants with legal services related to immigration matters, but is not licensed to practice law.

Martinez first submitted his application. *See Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005). On April 4, 1996, the Immigration and Naturalization Service ("I.N.S.") changed its position to recognize persecution based on sexual orientation as a valid ground for asylum. *See* App. 15 (Pregerson, J., dissenting). Nineteen days later, on April 23, 1996, Martinez filed a detailed declaration explaining his true reasons for seeking asylum. *See* App. 15-16 (Pregerson, J., dissenting).

When Martinez appeared before an Immigration Judge ("IJ") at his first merits hearing, he immediately withdrew his original application for asylum, explained that the original application was inaccurate, and submitted his new declaration recounting the abuses that arose from the persecution he suffered because of his sexual orientation. Martinez explained that he was afraid to reveal his sexual orientation in his original asylum application because he feared he would be deported to Guatemala and would be harmed. To substantiate Martinez's previous fear of disclosing his sexual orientation and his modified claim for asylum, Martinez, his life partner, his present employer, and two experts (who provided evidence regarding the level of persecution against gay men in Guatemala) testified on his behalf. In addition, Martinez submitted approximately 200 pages of country condition reports detailing the persecution of homosexuals in Guatemala.

The IJ denied Martinez's claim, finding his testimony not credible on the sole ground that Martinez's

initial asylum application was false and failed to disclose his sexual orientation. The IJ did not mention a single discrepancy, inconsistency or implausibility with respect to Martinez's testimony about his operative asylum claim based on sexual orientation. On April 30, 2002, the BIA adopted and affirmed the IJ's adverse credibility determination.

On July 25, 2003, the Ninth Circuit granted a petition for review filed by Martinez. *See Martinez v. I.N.S.*, 72 Fed. Appx. 564, 2003 WL 21750801 (9th Cir. July 25, 2003) (asserting jurisdiction under 8 U.S.C. § 1105a (repealed 1996)). The Ninth Circuit held that Martinez's explanation for fearing to disclose his sexual orientation was not a material misrepresentation because it was "wholly consistent" with the second asylum application that was presented before the IJ. *Id.* at *1. In particular, the Ninth Circuit observed that Martinez presented a reasonable explanation when he testified that "the misrepresentation was due to a fear of facing further persecution if the government learned of his sexual orientation." *Id.* The Ninth Circuit therefore remanded the matter back to the BIA because the BIA's credibility finding was not "legitimate, let alone cogent." *Id.*

Following the Ninth Circuit's decision, Martinez filed a timely motion alleging that he should be granted asylum and withholding from deportation because of his fear of facing further persecution based on his sexual orientation. In the same motion, Martinez asserted that he had established a *prima facie* claim pursuant to the Convention Against

Torture ("CAT"), 8 C.F.R. § 208.16(c)(2), because it was more likely than not he would be tortured if he returned to Guatemala.[2] The Government did not oppose Martinez's motion.

On May 19, 2004, the BIA denied Martinez's claims for asylum and withholding, finding that Martinez's failure to disclose his sexual orientation in his initial application in 1992 was material. App. 19. The BIA also denied Martinez's CAT claim because Martinez purportedly "failed to establish that it is more likely than not that he will be tortured by government officials if he returned to Guatemala." App. 21. The BIA did not provide any explanation for the latter finding. *Id.*

On March 3, 2009, in the decision at issue, the Ninth Circuit denied Martinez's petition for review of the BIA's decision, his claims for asylum and withholding of removal, and his motion to reopen to consider his CAT claim. App. 1-14. The Ninth Circuit's decision states that Martinez lied under oath, and that his lies were "material and went to the

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[2] Martinez was not able to present a CAT claim earlier because the remedy was not available until 1999, which was three years after his hearing before the IJ. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8482-8483 (February 19, 1999) (codified at 8 C.F.R. §§ 208.16-208.18 (1999)); *see also* 8 C.F.R. § 208.16(c)(1) ("Convention Against Torture" refers to the United Nations Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment, as implemented, with provisos, by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105-277, 112 Stat. 2681, 2681-821).

heart" of his asylum claim. App. 13. The lies referenced by the majority relate only to those made by Martinez in his original asylum application, *see* App. 12-13, which was not the operative application under consideration by the time Martinez appeared for his first merits hearing before the IJ, *see* App. 15-17 (Pregerson, J., dissenting). There is no evidence in the record that Martinez ever lied about being persecuted based on his sexual orientation, which served as the basis for the modified, operative asylum application that was presented to the IJ.

Judge Harry Pregerson filed a dissenting opinion in *Martinez*. App. 14-17 (Pregerson, J., dissenting). Judge Pregerson's dissent observed that, taken in context, there was a rational explanation for Martinez's modification to his application:

> [i]f Martinez had filed his asylum application in 1992 alleging persecution on account of his sexual orientation, he would likely have been deported. . . . Martinez misrepresented the truth solely to avoid persecution in Guatemala based on his sexual orientation, in response to U.S. immigration policies forbidding such asylum claims at the time he made the statements.

App. 15-16 (Pregerson, J., dissenting). "In this context," Judge Pregerson explained, "it is easy to understand how Martinez might have felt compelled to tailor his story to avoid being returned to Guatemala, where he suffered persecution on account of his sexual orientation." App. 15 (Pregerson, J., dissenting).

On April 16, 2009, Martinez petitioned the Ninth Circuit for rehearing. On September 8, 2009, the Ninth Circuit denied Martinez's Petition for Rehearing and Petition for Rehearing *En Banc*. App. 22.[3]

REASONS FOR GRANTING PETITION

THIS COURT SHOULD RESOLVE A SPLIT AMONG THE CIRCUITS AND DECIDE A QUESTION OF NATIONAL IMPORTANCE AS TO WHETHER, IN IMMIGRATION CASES COMMENCED BEFORE THE EFFECTIVE DATE OF THE REAL ID ACT OF 2005, FALSE STATEMENTS MADE IN THE COURSE OF SEEKING ASYLUM MAY AUTOMATICALLY BAR APPLICANTS FROM RELIEF OR WHETHER FALSE STATEMENTS MUST BE CONSIDERED IN THE CONTEXT OF AN ALIEN'S OPERATIVE ASYLUM APPLICATION.

There Is A Split Among The Circuits As To Whether And When, In Pre-REAL ID Act Cases, A False Statement Made In The Course Of Seeking Asylum Should Bar Relief.

The Ninth Circuit's decision in *Martinez* creates a *per se* rule that, in a case commenced before the

[3] Martinez applied to the Ninth Circuit and then to Associate Justice Anthony M. Kennedy for a stay of the Ninth Circuit's mandate. The applications were denied on October 27 and 30, 2009, respectively.

effective date of the REAL ID Act of 2005, a false statement made in the course of seeking asylum may bar relief whether or not the false statement actually goes to the heart of the applicant's operative asylum application. The Ninth Circuit's decision in *Martinez* is supported by decisions from the First Circuit, but stands in conflict with decisions from the Second, Third, Sixth, Seventh and Tenth Circuits, which hold that false statements must be evaluated in the context of the application then under consideration.

For asylum cases commenced after May 11, 2005, an IJ may rely on *any* inconsistency or omission in making an adverse credibility determination "*without regard* to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added). *See also* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (2005) (the "REAL ID Act").

For ***pre***-REAL ID Act cases – *i.e.*, cases, such as the one at bar, originally filed before the REAL ID Act's effective date – most circuit courts around the country consistently hold that a false statement made in the course of seeking asylum may not, *per se*, bar an applicant from relief. For example, in the pre-REAL ID Act case of *Guo v. Ashcroft*, 386 F.3d 556, 562-563 (3d Cir. 2004), the Third Circuit held that the mere fact that an immigration judge had previously rejected, as not credible, a Chinese national's claims of persecution in her homeland as a result of her religious beliefs did not provide sufficient basis for

denying, based on a prior adverse credibility finding, the alien's motion to reopen removal proceedings to present evidence that, because she became pregnant with a second child while present in the United States, she had a well-founded fear of forced abortion or forced sterilization if returned to Mainland China based on China's one-child policy because the prior credibility finding was made in a completely different context, on an unrelated religious-based claim for asylum. The *Guo* court held that an adverse credibility finding in one asylum application does not "beget another," and "an IJ must justify each adverse credibility finding with statements or record evidence specifically related to the issue under consideration." *Id.* at 562; *see also id.* ("[t]he legitimacy of an initial credibility determination does not . . . justify denial of all subsequent applications for asylum").

Like the Third Circuit in *Guo*, the Second, Sixth, Seventh and Tenth Circuits have rejected, under similar facts, a *per se* adverse credibility rule in pre-REAL ID Act cases, insisting instead that immigration judges evaluate falsities and discrepancies in context and only find false statements to be material if they actually and specifically go to the heart of the application under consideration.[4]

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[4] *See Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 167 (2d Cir. 2006) (remanding an asylum claim because the IJ "did not evaluate [the applicant's] explanation that she feared being jailed in the United States" as the reason why she did not reveal her actual asylum claim to an immigration officer); *Diallo v. Gonzales*, 445 F.3d 624, 629 (2d Cir. 2006) ("a petition for review

(Continued on following page)

Martinez is a pre-REAL ID Act case. *See* App. 3. The *Martinez* court held that Martinez's misrepresentations were material and went to the heart of his claim for asylum, App. 13, but they did not relate at all to the operative claim for asylum that he presented at his first merits hearing before the IJ, *see* App. 15-17 (Pregerson, J., dissenting). Martinez's misrepresentations went only to the asserted basis for his initial, superseded asylum application filed back in 1992. Martinez's prior false statements about persecution based on political opinion were not material to his request for asylum for an entirely different reason – fear of persecution because of his

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may be granted in the face of an adverse credibility decision by the IJ when she fails to engage or evaluate an asylum applicant's explanations for apparent inconsistencies in the record") (internal quotation marks omitted); *Uanreroro v. Gonzales*, 443 F.3d 1197 (10th Cir. 2006) (alien fleeing persecution who lied to an immigration inspector by stating that the passport she carried was hers and that she had lived in London for the previous six months, did not constitute sufficient evidence to support adverse credibility determination in asylum proceeding); *N'Diom v. Gonzales*, 442 F.3d 494, 499 (6th Cir. 2006) (remanding case because "[n]either the Immigration Judge nor the Board explains why they disbelieve [the applicant's] explanation for" discrepancies between his written application and testimony); *Shtaro v. Gonzales*, 435 F.3d 711, 716 (7th Cir. 2006) ("[A]dverse credibility determinations may not be based on minor discrepancies that are easily explained . . . and the IJ did not attempt to ascertain whether these omissions could be accounted for"); *Mece v. Gonzales*, 415 F.3d 562, 575-76 (6th Cir. 2005) (adverse credibility findings in pre-REAL ID case must "'go to the heart'" of the applicant's asylum claim and cannot be based on "'irrelevant inconsistencies'").

sexual orientation. The IJ, BIA and majority in *Martinez* thus adopted a *per se* rule that Martinez's original lies, based on a previous, and later renounced, iteration of his asylum application, warranted an adverse credibility determination with regard to a modified asylum application rooted in different circumstances, the factual basis for which was never called into doubt with any contrary evidence.

The Ninth Circuit's decision in *Martinez* is in line with decisions from the First Circuit. For example, in *Toure v. Ashcroft*, 400 F.3d 44, 47-48 (1st Cir. 2005), the First Circuit affirmed an immigration judge's adverse credibility determination, which relied on inconsistent testimony that an applicant provided in her husband's removal proceedings before a different immigration judge. *See also Yongo v. I.N.S.*, 355 F.3d 27, 33-34 (1st Cir. 2004) (holding that false information in an alien's prior asylum application in Germany was "arguably pertinent to [the alien's] ability to qualify for asylum under United States law"). *Martinez* and the decisions from the First Circuit conflict with precedent from the Second, Third, Sixth, Seventh and Tenth Circuits that requires a fact-finder in pre-REAL ID Act cases to analyze the bases and context for discrepancies before categorically finding that a lie defeats an asylum claim.

In addition to the split *among* the circuits described above, there is also widespread confusion *within* circuits as to whether false testimony in a pre-REAL ID Act asylum application can give rise to a *per*

se adverse credibility determination. For example, the Second Circuit does not have a consistent body of law when it comes to adverse credibility determinations in pre-REAL ID Act cases. *Compare Ucelo-Gomez v. Gonzales*, 464 F.3d at 167 and *Diallo v. Gonzales*, 445 F.3d at 629 *with Siewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007) (holding that inconsistent testimony in pre-REAL ID Act cases may support an adverse credibility determination even where it does not go to the heart of an applicant's claim). And, notwithstanding the decision in *Martinez*, the Ninth Circuit also has rejected a *per se* rule in pre-REAL ID Act cases. *See Jibril v. Gonzales*, 423 F.3d 1129, 1134 (9th Cir. 2005); *Turcios v. I.N.S.*, 821 F.2d 1396, 1400 (9th Cir. 1987). Although this Court typically does not resolve splits within circuits, where, as here, intra-circuit conflicts relate to a recurring and important issue or are accompanied by conflicts among the circuits, certiorari is warranted. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 467 (1967); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948) (certiorari granted because of differing views within a circuit that was most frequently confronted with difficult bankruptcy problems).

The Third Circuit's decision in *Guo*, Judge Pregerson's dissent in *Martinez*, the Ninth Circuit's decisions in *Jibril* and *Turcios* and the similar decisions of the Second, Sixth, Seventh and Tenth Circuits came to the proper conclusion: a misrepresentation is material only if it goes to the heart of the asylum application that is operative and under

consideration. If this case were decided in, for example, the Third Circuit, that court, consistent with its holding in *Guo*, would have held that Martinez's false statements on his initial asylum application were not material to, and did not go to the heart of, his modified, operative asylum application, which was based on his fear of persecution because of his sexual orientation.

The Split Affects Thousands Of Applicants For Asylum In Courts Throughout The United States.

The United States Circuit Courts of Appeals hear approximately 10,000 appeals from the BIA each year.[5] The Ninth Circuit hears nearly half of those appeals. *Id.* The Ninth and Second Circuits, combined, hear a majority of the 10,000 annual appeals from the BIA. *Id.* Over the past several years, approximately thirty-five to forty percent of the Second and Ninth Circuits' dockets have concerned immigration cases. *Id.* "A substantial percentage of these immigration cases concerns asylum, and credibility determinations are the most challenged aspect of asylum claims." Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 Texas Int'l L. J. 185, 187 (Winter 2008) (hereinafter "Rempell") (citation omitted).

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[5] *See* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

The exact number of pre-REAL ID Act cases involving adverse credibility determinations is not available, but there are likely thousands of such cases still working their way through the lower courts. One commentator, who wrote favorably of the REAL ID Act last year, acknowledges that the volume of pre-REAL ID Act cases is likely high as the REAL ID Act is only beginning to impact the circuit courts:

> [T]he impact of the REAL ID Act amendments to the INA is only beginning to be felt, as asylees' applications make their way from the U.S. Citizenship and Immigration Services asylum offices, if applicable, to the immigration judges initially adjudicating the cases, to the Board of Immigration Appeals ("Board" or "BIA"), and then to the United States Court of Appeals sitting within the applicable venue.

Rempell, *supra*, p. 13 at 188 (footnotes omitted).

This Court should guide asylum officers, immigration judges, the BIA and circuit courts by resolving a conflict in the law impacting thousands of people whose immigration cases commenced before May 11, 2005.

THIS COURT ALSO SHOULD RESOLVE A SPLIT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER AN ADVERSE CREDIBILITY DETERMINATION MADE WITH REGARD TO AN ASYLUM APPLICATION AUTOMATICALLY DISPOSES OF A SEPARATE CLAIM UNDER THE CONVENTION AGAINST TORTURE.

The Circuit Courts Are Divided As To Whether An Adverse Credibility Determination Regarding An Alien's Asylum Claim Automatically Disposes Of A Separate Claim Under The Convention Against Torture.

The Ninth Circuit concluded in *Martinez* that an adverse credibility decision in connection with Martinez's asylum claim automatically disposed of Martinez's claim under the Convention Against Torture ("CAT"), 8 C.F.R. § 208.16(c)(2). The Eighth Circuit would agree with the Ninth Circuit's decision, but the Second, Third, Sixth and Seventh Circuits would not.

Martinez presented extensive evidence to the BIA that established a *prima facie* claim under CAT that it was more likely than not that he would be tortured if returned to Guatemala.[6] Besides his own testimony

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[6] *See* 8 C.F.R. § 208.16(c)(2) (removal must be withheld under CAT if the petitioner establishes that it is more likely than not that he would be tortured if removed to the proposed country of removal).

detailing the rape, physical attacks, and threats he suffered at the hands of a Guatemalan congressman, police officers, and others, Martinez also offered the testimony of two experts regarding the extreme dangers he faced if he returned to Guatemala. Martinez also provided extensive documentary evidence, including 200 pages of country condition reports demonstrating the risk of torture he would face if returned to Guatemala.

There is no evidence in the record contrary to Martinez's evidence in support of his CAT claim. Moreover, the Government did not contest the evidence when it was first presented to the BIA. Nonetheless, the BIA held that Martinez had not made a *prima facie* case under CAT. App. 21. The BIA provided no reason for its holding other than the *ipse dixit* statement that "the respondent failed to establish that it is more likely than not that he will be tortured by government officials if returned to Guatemala." *Id.* The Ninth Circuit's decision affirming the BIA's holding consisted of nothing but a single-sentence footnote that the "BIA did not abuse its discretion in concluding that Martinez failed to establish a prima facie case" under CAT. *Martinez*, App. 14 n.1. Neither the BIA nor the Ninth Circuit acknowledged, let alone addressed, the extensive testimonial, expert, and documentary evidence Martinez provided in support of his CAT claim.

The BIA's and the Ninth Circuit's failure to articulate any independent basis for rejecting the CAT claim strongly indicates that they believed

that the adverse credibility determination against Martinez with regard to his asylum claim automatically disposed of his CAT claim as well. In so doing, the BIA and the Ninth Circuit effectively combined the adjudication of Martinez's asylum claim and his CAT claim into one single inquiry, with the two claims rising and falling together based on the adverse credibility determination made explicitly with regard to his asylum claim.

The Ninth Circuit's conclusion that the BIA's adverse credibility determination as to Martinez's asylum claim must mechanically dispose of his CAT claim conflicts with the law of other circuits. For example, in *Ramsameachire v. Ashcroft*, 357 F.3d 169, 184-186 (2d Cir. 2004), the Second Circuit vacated dismissal of a petitioner's CAT claim because the BIA had failed to analyze the CAT claim separately from his asylum claim, which had been rejected based on an adverse credibility determination. The court explained that the BIA had erred in rejecting the CAT claim "by placing determinative weight on the adverse credibility determination" it had made regarding the asylum claim. *Id.* at 184. The court added:

> More fundamentally, both the IJ and BIA incorrectly assumed that Ramsameachire's CAT claim was necessarily precluded because he had failed to carry his burden of proof with respect to his asylum claim. Because the CAT inquiry is independent of the asylum analysis, however, the BIA's decision with respect to an alien's claims for

> asylum and withholding of removal pursuant to the INA should never, in itself, be determinative of the alien's CAT claim.

Id. at 184-185.

The Second Circuit also recognized that combining the adjudication of asylum and CAT claims into one single determination does not just result in a technical procedural error, but can lead to substantively incorrect decisions regarding CAT claims. *See id.* at 185-186. This is because an adverse credibility determination may "doom an alien's asylum claim, but may not be a particularly significant aspect of the CAT inquiry," as the CAT inquiry focuses on matters other than just a petitioner's testimony such as expert testimony and documentary evidence including country reports. *Id.* at 185. Such is the case with Martinez, who offered significant and uncontested expert and documentary evidence demonstrating the likelihood that he would be tortured if he were returned to Guatemala. Moreover, there is no clear nexus between the determination of whether Martinez would face torture in Guatemala, which is the proper inquiry on his CAT claim, and the IJ's and BIA's belief that Martinez's credibility was damaged by his failure to disclose his sexual orientation in his initial asylum application, which was the BIA's and the Ninth Circuit's stated grounds for denying his asylum claim.

The Third, Sixth, and Seventh Circuits have issued decisions consistent with the Second Circuit's

decision in *Ramsameachire* and inconsistent with the Ninth Circuit's decision in *Martinez*. *See Zubeda v. Ashcroft*, 333 F.3d 463, 476 (3d Cir. 2003); *Mansour v. I.N.S.*, 230 F.3d 902, 908 (7th Cir. 2000); *Ndiaye v. Gonzales*, 184 Fed. Appx. 458, 463 (6th Cir. 2006). On the other hand, the Eighth Circuit has issued decisions consistent with *Martinez's* holding that an adverse credibility determination made in connection with a petitioner's asylum claim automatically disposes of his CAT claim as well. *See Desna v. Gonzales*, 454 F.3d 896, 899 (8th Cir. 2006); *Cooke v. Mukasey*, 538 F.3d 899, 908 (8th Cir. 2008); *Alemu v. Gonzales*, 403 F.3d 572, 576 (8th Cir. 2005).

In addition to the division among the circuits, there is a lack of uniformity *within* the Ninth Circuit. In contrast to the holding in *Martinez*, the Ninth Circuit in *Kamalthas v. I.N.S.*, 251 F.3d 1279, 1283 (9th Cir. 2001), vacated the denial of a CAT claim because the BIA "failed to recognize the central distinction that claims for relief under the Convention are analytically separate from claims for asylum" and "plainly overrelied on its prior adverse credibility finding against [petitioner] and failed to consider evidence of the relevant country conditions in the record" that were relevant to the CAT claim.

If Martinez's case were decided in the Second, Third, Sixth or Seventh Circuits – or under the Ninth Circuit's decision in *Kamalthus* – the result would have been different. Those courts would not have rejected his CAT claim because of an adverse credibility determination made as part of his asylum

claim. Instead, Martinez's CAT motion, which was not opposed by the Government, would have been evaluated separately, on its own merits. Based on the record in this action, those courts would have concluded properly that Martinez made a *prima facie* showing that it was more likely than not he would be tortured if he returned to Guatemala.

The Conflict In The Courts Below Raises An Important Question Of Federal Law Impacting An Increasing Number Of Claimants Under The Convention Against Torture.

There is a profound nationwide division of opinion on the proper relationship between adverse credibility determinations and CAT, which potentially impacts every alien applying for both asylum and protection under CAT. Adverse credibility determinations were made before and after passage of the REAL ID Act, but the REAL ID Act now gives judges nationwide the expanded authority to make adverse credibility determinations "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." 8 U.S.C. § 1158(b)(1)(B)(iii). This expanded authority to make adverse credibility determinations heightens the need for this Court to give guidance as to the proper relationship, if any, between adverse credibility determinations in asylum cases and CAT cases because it is likely that the number of adverse credibility determinations will increase nationwide.

Moreover, because of the expanded discretion afforded judges under the REAL ID Act, asylum claims likely will be denied more often, which makes it all the more important not to have asylum credibility determinations automatically dispose of CAT claims.

CONCLUSION

Saul Gregorio Martinez respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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557 F.3d 1059

United States Court of Appeals,
Ninth Circuit.
Saul Gregorio MARTINEZ, Petitioner,
v.
Eric H. HOLDER, Jr., Attorney General, Respondent.
No. 04-72975.

Argued and Submitted Dec. 7, 2007.
Filed March 3, 2009.

Kari E. Hong, Law Offices of Helen A. Sklar, Los Angeles, CA, for the petitioner.

Arthur L. Rabin, U.S. Department of Justice, Office of Immigration Litigation, Washington, D.C., for the respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A70-217-803.

Before: HARRY PREGERSON, JOHN T. NOONAN, and STEPHEN S. TROTT, Circuit Judges.

Opinion by Judge TROTT; Dissent by Judge PREGERSON.

TROTT, Circuit Judge:

Saul Martinez, a native of Guatemala, petitions for review of a Board of Immigration Appeals' ("BIA") decision that denied his claims for asylum, withholding of removal, and voluntary departure. In a 2003 decision, this court remanded the matter to the BIA for further proceedings, concluding that it had failed to provide cogent reasons for rejecting

Martinez's testimony in support of his application. *Martinez v. I.N.S.*, 72 F. App'x 564 (9th Cir.2003). In its recent decision, the BIA upheld the Immigration Judge's ("IJ") adverse credibility finding regarding Martinez. Martinez also petitions for review of the BIA's decision that denied his motion to reopen to consider his Convention Against Torture claim.

We have jurisdiction over this timely petition, which we deny on both counts.

I

"We review adverse credibility findings under the substantial evidence standard." *Rivera v. Mukasey*, 508 F.3d 1271, 1274 (9th Cir.2007). "The BIA must have a legitimate articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated disbelief." *Valderrama v. I.N.S.*, 260 F.3d 1083, 1085 (9th Cir.2001) (internal quotation marks omitted). Here, because the BIA failed when it first heard this case to provide specific, cogent reasons to support its initial adverse credibility determination, we remanded to give the BIA the opportunity to provide reasons for its conclusions. *See Garrovillas v. I.N.S.*, 156 F.3d 1010, 1015-16 (9th Cir.1998) (finding that the BIA's decision was not supported by substantial evidence and remanding to the BIA with instructions to provide specific reasons). The BIA has followed our instructions, and we now review its decision.

II

The facts pertaining to Martinez's credibility – or the lack thereof – are striking. In his initial Request for Asylum in the United States dated September 21, 1992, he made the following admittedly false representations under penalty of perjury, declaring that "the above and all accompanying documents are true and correct to the best of my knowledge and belief":

> I am seeking Asylum in the US. Because in Guatemala I was threatened by the Gobernment because I was in the University of San Carlos I was Leader of the Students in the University of San Carlos and for this reason the Gobernment persecuted and threatened me, I am afraid to return Guatemala because many of my companions to disappear completely and I can to disappear likewise. I was constantly threatened by the Gobernment and my life was in more danger than the rest of the people of my country. If I didn't leave, I would have been killed.
>
> The constant conflicts that exist in Guatemala no security for anyone. In my case that I belonged to student groups is very hard to live in Guatemala.
>
> . . . .
>
> I was in Student Group of The University of San Carlos during the period between 1986 to Nov. 1991. I was active member. My duties were to organized Political Meeting. And organized to the Students.

. . . .

> I was threatened by the Gobernment they have gone on various occasions to my house and the University looking for me. because I was Leader of the Students in the University of San Carlos, causing my life to be threatened to death by the Gobernment.

. . . .

> I came to the US. in search of protection of my life, I also came in search of a peaceful life without always having to fear for my life, because in Guatemala my life was in danger, I was always persecuted by the Gobernment.

The next step in what turns out to have been a plot to deceive the Immigration and Naturalization Service, the United States Department of Justice, and the Attorney General was to foil the asylum officer assigned to his case. To accomplish this ruse, he appeared in person before the officer three years after his application and testified under oath – again falsely – that he was the victim of persecution "on account of my political opinion." Moreover, he swore before the officer that the content of his initial request was true. The officer's Assessment Report dated November 14, 1995, demonstrates that his hoax was designed to fit neatly into the requirements of our asylum law. The officer's report reads as follows:

> Applicant indicated that he is a 31-year-old male native and citizen of Guatemala who entered the United States on May 14, 1992 at San Ysidro, Ca without inspection.

Applicant fears that he will be killed by the government on account of his *political opinion.*

Applicant credibly testified that in January 1991, he became a leader in a student club at San Carlos University. Applicant stated that he began having problems due to his political opinion after participating in Mardi Gras type parades with political overtones. Applicant began receiving threatening phone calls in January 1991 and believed that agents of the government were responsible. Applicant did not stated [sic] a political opinion in response to the phone calls. Applicant stated that the calls persisted through June 1991, when Applicant went to visit his parents in Puerto Barrios. Applicant did not expereince [sic] any problems in Puerto Barrios and stated that it was a remote little town far from Guatemala City. In August 1991, Applicant was chased by a car. Applicant was not harmed, although he believed that the government was responsible. In November 1991, Applicant was again chased by a car and shot at. Applicant was not harmed and believed that the government was trying to scare him. Applicant left Guatemala the next day and traveled through Mexico prior to coming to the United States. Applicant further stated that he has a brother, who is currently living in Guatemala City and not experiencing any problems with the Government. Applicant's family is presently living in Puerto Barrios,

> and not experiencing problems with the government.
>
> Applicant has been threatened on several occasions on account of his political opinion. Threats alone do not constitute persecution. The Applicant has not established a well-founded fear of future persecution. It appears that the threats the Applicant suffered were local in nature. The Applicant was able to live in Puerto Barrios, and not experience problems with the government. Applicant's parents are presently living in Puerto Barrios and not experiencing problems. Applicant has not established that the government has the inclination to pursue him. Applicant can relocate.
>
> For the foregoing reasons, Applicant is not eliglible [sic] for asylum in the United States. Assessment is to refer to the Immigration Judge.

(emphasis added).

Three aspects of this report are particularly noteworthy. First, the level of invented detail with which Martinez presented his false claim. Second, his ability to convince an experienced asylum officer that his swindle was credible; and third, Martinez's failure nonetheless to achieve a favorable asylum eligibility recommendation.

Having failed to convince the asylum officer that his phony political persecution story made him eligible for asylum, Martinez simply changed his tune,

shed his first yarn, and showed up three months later for a hearing before an IJ, armed with an entirely new ground designed to make him eligible for asylum. No longer had he been a victim of persecution on account of his political opinion. Now, euphemistically calling his bogus initial request "partially incorrect," he averred that he had been persecuted because of his homosexuality.

When confronted at his hearing with his previous story, Martinez conceded that both the elaborate tale he recounted in his initial request and then repeated in person three years later to the asylum officer was a fabrication. He allowed that he had taken an oath to tell the truth to the officer, but that he had lied anyway because his "life was in danger." When pressed, Martinez admitted that the asylum officer had not been intimidating and that he had never had any problem during the four years he had been in the United States with government officials because of his homosexuality.

The context of Martinez's lies under oath to the asylum officer was the subject of direct testimony by the officer, none of which supports the existence of a hostile interview atmosphere which would explain Martinez's adherence to his lies or his alleged fear of danger. The officer's testimony amply supports the IJ's disbelief of Martinez's explanation of his lies. Stating that he specifically recalled Martinez's interview, the officer said:

I, I do swear them in also. I think I stated that also, you know, as I was sworn today stating that he should tell the truth and such. We – I personally explain the procedure trying to make him feel as comfortable as possible letting them know what the next step is in the procedure even prior to getting to the interview. After explaining the procedure we go ahead and verify the biographical data on the I-589, okay, and ask for any other evidence that he may be willing to provide at that time. *We assure that the interview is very confidential, that nothing will get back to Guatemala. That's part of the procedure and basically trying to reassure the applicant we're there to help them if we can.* So they tell, tell us their complete story and we go, we go ahead over all the biographical information and also the, the testimony on the I-589. And we, we start – usually I start by asking him the application to tell me the most severe incidents that he experienced in Guatemala that compelled him to come to the United States. I make it clear that there are five grounds so there is not just, not just one ground that there – I also let them know that there is membership in political social-political group which is more or less a – membership in a, in a social group, excuse me. Not necessarily in a political group. I do ask whether he's, he's been a member of any groups or organizations, political or otherwise, other than the Catholic church per se. I, I do make it clear that there are five grounds. And we, we get into eliciting

> information, ascertaining that information for credibility, that's the majority of the interview. Okay. We stress credibility very highly and then upon completion of the interview I, I bring any changes that were made during the interview on the 589 or in testimony, anything that is inconsistent with what, what was explained originally. That is addressed. Upon addressing any inconsistencies we have the applicant sign stating that all the testimony that he has provided on the 589 and also his verbal testimony is true and correct.

(emphasis added).

In a thorough and detailed twenty-three page decision, the IJ arrayed every aspect of the case and evidence before him and then turned to Martinez's credibility. Noting that the burden to demonstrate eligibility rested with the petitioner, the IJ made the following lack of credibility finding:

> The Respondent has presented insufficient specific facts as well as concrete and/or credible evidence for the Court to infer that he has been persecuted or has a well-founded fear of persecution in Guatemala on account of his race, his religion, his nationality, his membership in a particular social group or his political opinion. The basis of the Respondent's claim to asylum before this Court was dramatically inconsistent with the claim presented to the INS in 1992 and reaffirmed before an INS asylum officer on November 13, 1995. Although Respondent

provides an explanation for the different claims I do not find that explanation to be credible.

In light of the Respondent's intelligence and more than three years time in the Los Angeles area during which time he appears to have freely associated with other gays and to have had no untoward difficulties with governmental authorities Respondent did not acquire the articulate intelligent relaxed demeanor which he exhibited in this Court overnight. Moreover, we have a situation where the Respondent did worse than neglect for whatever reason to refer to his "homosexual" claim in 1992 or 1995, he set forth "student/political" claim which was completely untrue and he knew it was untrue. The Respondent's prior experience does not entitle him to come to the United States and lie to a governmental official to secure benefits under the laws of this country. Based upon this conduct I find that Respondent's present claim of mistreatment due to his homosexuality lacks credibility and, indeed, that Respondent is not a person of good moral character as that term is defined at Section 101(f)(6) of the Act.

. . . .

The Respondent has applied for the privilege of voluntary departure pursuant to Section 244(e) of the Act as it existed prior to April 1, 1997. That section requires an alien to establish that he is a person of good moral

> character at least five years immediately preceding his application. Good moral character as a defined term in Section 101(f)(6) of the Act bars the finding of good moral character if the alien has given false testimony for the purpose of obtaining any benefit under the Act. In this case, Respondent is unable to establish statutory eligibility as he gave false testimony before an INS asylum officer on November 13, 1995 for the purpose of obtaining asylum in the United States pursuant to Section 208 of the Act.

Accordingly, Respondent's application for voluntary departure is denied on statutory grounds.

The BIA determined in its first Order denying asylum that Martinez had not presented a credible testimonial claim sufficient to satisfy his burden of proof. Addressing Martinez's attempted explanation for the difference between his two stories, the BIA said, "We are not persuaded by the respondent's explanations for this discrepancy." On remand, the Board affirmed its adoption in its first Order of the IJ's adverse credibility finding, this time giving reasons for its decision:

> On July 25, 2003, the Ninth Circuit remanded the instant proceeding to the Board after finding that the Board failed to provide a specific, cogent reason for rejecting the respondent's justification for misrepresenting the basis of his fear. Through his appeal, the respondent incorporates a motion to remand

to pursue relief under the Convention Against Torture ("CAT"). The respondent's appeal is dismissed. The respondent's motion is denied.

Upon review, we affirm our prior resolution of the instant case. Specifically, we find that the respondent failed to sustain his burden of proof regarding asylum as the result of his lack of credibility. The record reflects that the respondent twice misrepresented the basis of his fear while testifying under oath (Exhs. 2 and 12). Specifically, we note that the respondent initially claimed that he had been persecuted on account of his political opinion, however, he subsequently retracted this claim and instead, asserted that he suffered persecution on account of his sexual orientation. We find this discrepancy material as it goes to the heart of the respondent's asylum claim.

Although the respondent explained that the afore-mentioned misrepresentation was due to his fear of experiencing additional persecution if the United States government learned of his sexual orientation, we do not find his justification persuasive. As observed by the Immigration Judge, the respondent spent more than 3 years in the Los Angeles area freely associating with other gays and furthermore, he did not experience any problems with any United States governmental authorities (I.J. at 17). As further noted by the Immigration Judge, the respondent exhibited an "articulate, intelligent and

relaxed demeanor." *Id.* In sum, we adopted the Immigration Judge's decision below as the Immigration Judge articulated cogent reasons for his adverse credibility finding.

III

As the record reveals, Martinez repeatedly and persistently lied under oath with respect to his application for asylum. That his skillful lies were material and went to the heart of his presentation goes without saying. The IJ's reasons for his adverse credibility finding "bear a legitimate nexus" to his decision. *Salaam v. I.N.S.*, 229 F.3d 1234, 1238 (9th Cir.2000); and we can discern no flaw in either the IJ's or the BIA's cogent reasoning. *Gui v. I.N.S.*, 280 F.3d 1217, 1225 (9th Cir.2002). Thus, both the IJ and the BIA's specific adopted adverse credibility findings are well supported by substantial uncontroverted evidence in the record. *Al-Harbi v. I.N.S.*, 242 F.3d 882, 889-90 (9th Cir.2001) (affirming negative credibility finding supported by applicant's "propensity to change his story regarding incidents of past persecution").

An asylum seeker's incentive to lie is not curtailed by fear of the IJ's scrutiny or the government's fact checkers. These are only small obstacles that can be easily overcome. The major check on the asylum seeker's incentive to lie is an oath to tell the truth, and the asylum seeker's belief that he or she will be held to that oath. It is fair to say that the asylum process is ultimately an honor system – it depends

largely on the assumption that asylum seekers will take the oath seriously, and that they will be truthful in their testimony. The Ninth Circuit can do much to reduce the risk of error and to mitigate unfair procedures in immigration proceedings. However, in order for the process to work, we must construe and enforce the oath strictly, so that we may be more lenient elsewhere in the process. Accordingly, we deny Martinez's petition for review.[1]

Petition **DENIED.**

PREGERSON, Circuit Judge, Dissenting:

It was wrong for Martinez initially to tell a false tale about his persecution in Guatemala to immigration authorities. But it is not hard to see why a gay man who suffered persecution on account of his sexual orientation would want to hide that fact from immigration authorities. When Martinez filed his asylum application in 1992, the INS had not yet recognized that persecution on account of sexual orientation provided a valid basis for an asylum claim. *See Karouni v. Gonzales,* 399 F.3d 1163, 1171 (9th Cir.2005). Indeed, before the Immigration Act of 1990, homosexuality was a ground on which to *exclude* any immigrant who wished to enter this

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[1] We conclude that the BIA did not abuse its discretion in concluding that Martinez failed to establish a prima facie case that warrants reopening under the Convention Against Torture.

country. *See* Pub. Law 101-649 § 601, 104 Stat. 4978, 5067 (1990); *see also* House Rep. No. 723(I), 101st Cong., 2d Sess., p. 56, reprinted in 1990 U.S.Code Cong. & Ad. News 6710, 6736. In this context, it is easy to understand how Martinez might have felt compelled to tailor his story to avoid being returned to Guatemala, where he suffered persecution on account of his sexual orientation.

In reviewing an IJ's adverse credibility finding regarding an asylum petitioner, our court in *Turcios v. INS* stated: "Untrue statements by themselves are not reason for refusal of refugee status[,] and . . . it is the examiner's responsibility to evaluate [the petitioner's false] statements in the light of all the circumstances of the case." *Turcios v. INS,* 821 F.2d 1396, 1400 (9th Cir.1987) (finding that the lies petitioner told to immigration authorities actually *supported* petitioner's fear of deportation). If Martinez had filed his asylum application in 1992 alleging persecution on account of his sexual orientation, he would likely have been deported. Instead, Martinez initially alleged political persecution, a valid basis for an asylum claim in 1992, because he greatly feared being returned to Guatemala. It was not until April 1996 that the INS "formally adopted the 'position . . . that homosexuals *do* constitute a particular social group.'" *Karouni,* 399 F.3d at 1171 (quoting a Memorandum from David A. Martin, INS General Counsel, to All Regional and District Counsel (Apr. 4, 1996)). On April 23, 1996, nineteen days after the INS recognized that persecution based on sexual

orientation was a valid ground for an asylum claim, Martinez explained his true reasons for seeking asylum in the United States in a detailed declaration.

Accordingly, I disagree with the BIA's finding that the IJ in the case before us "articulated cogent reasons for his adverse credibility finding." As in *Turcios,* the IJ's explanation that Martinez was not credible because initially he made false statements to immigration officials was insufficient. In fact, Martinez's statements may have "support[ed] his claim of fear of persecution," *Turcios,* 821 F.2d at 1401, because Martinez misrepresented the truth solely to avoid persecution in Guatemala based on his sexual orientation, in response to U.S. immigration policies forbidding such asylum claims at the time he made the statements.

Furthermore, nowhere does Martinez testify that he feared "additional persecution [in the United States] if the United States government learned of his sexual orientation," as the BIA and Majority contend. Instead, Martinez's fear was premised on his belief that he would be further persecuted if the United States government were to deport him to Guatemala. The Majority states that the IJ's reasons for his adverse credibility finding did "bear a legitimate nexus" to the IJ's decision. I disagree. That Martinez was "freely associating with other gays" in Los Angeles has no bearing on or nexus to the IJ's decision that Martinez was not credible, nor does it have any bearing on or nexus to the suffering Martinez feared he would experience were he

deported to Guatemala. Therefore the IJ's negative credibility finding – affirmed by the BIA – doesn't hold water.

Because the IJ did not articulate cogent reasons for his adverse credibility finding, and because the IJ did not provide a legitimate nexus between the reasons for his adverse credibility finding and his ultimate decision, Martinez's petition should not have been denied. Accordingly, I dissent.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A70 217 803 – Los Angeles

Date: MAY 19 2004

In re: SAUL GREGORIO *MARTINEZ*

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Helen A. Sklar, Esquire

ON BEHALF OF DHS: Cassandra D. Casaus
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – Entered without inspection

APPLICATION: Asylum; withholding of removal; remand

This case was last before the Board on April 30, 2002, when we affirmed the Immigration Judge's decision to deny the respondent asylum, withholding and voluntary departure. Subsequently, the respondent filed an appeal with the United States Court of Appeals for the Ninth Circuit, the jurisdiction within which this matter arises. On July 25, 2003, the Ninth Circuit remanded the instant proceedings to the

Board after finding that the Board failed to provide a specific, cogent reason for rejecting the respondent's justification for misrepresenting the basis of his fear. Through his appeal, the respondent incorporates a motion to remand to pursue relief under the Convention Against Torture ("CAT"). The respondent's appeal is dismissed. The respondent's motion is denied.

Upon review, we affirm our prior resolution of the instant case. Specifically, we find that the respondent failed to sustain his burden of proof regarding asylum as the result of his lack of credibility. The record reflects that the respondent twice misrepresented the basis of his fear while testifying under oath (Exhs. 2 and 12). Specifically, we note that the respondent initially claimed that he had been persecuted on account of his political opinion, however, he subsequently retracted this claim and instead, asserted that he suffered persecution on account of his sexual orientation. We find this discrepancy material as it goes to the heart of the respondent's asylum claim. *See Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir. 1990).

Although the respondent explained that the aforementioned misrepresentation was due to his fear of experiencing additional persecution if the United States government learned of his sexual orientation, we do not find his justification persuasive. As observed by the Immigration Judge, the respondent spent more than 3 years in the Los Angeles area freely associating with other gays and furthermore,

he did not experience any problems with any United States governmental authorities (I.J. at 17). As further noted by the Immigration Judge, the respondent exhibited an "articulate, intelligent and relaxed demeanor." *Id.* In sum, we adopted the Immigration Judge's decision below as the Immigration Judge articulated cogent reasons for his adverse credibility finding. *See Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998).

We now turn to the respondent's motion. Pursuant to regulation, a motion to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . . " 8 C.F.R. § 1003.2(c)(1); *see INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam). "No hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening." *Matter of Sipus*, 14 I&N Dec. 229, 231 (BIA 1972). A decision to deny will depend "on the nature of the case and the force of the evidence already appearing in the record sought to be reopened." *Id.* Furthermore, a motion must state the new facts to be proved at reopening, supported by affidavits or other documentary evidence. 8 C.F.R. § 1003.2(c)(1). Finally, the decision whether to grant a motion to reopen is within the discretion of the Board. 8 C.F.R. § 1003.2(a).

In the instant case, we find that the respondent failed to establish a prima facie case that warrants reopening proceedings to allow him to seek relief

under the Convention Against Torture. *See Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). In particular, the respondent failed to establish that it is more likely than not that he will be tortured by government officials if returned to Guatemala. *See* 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a)(1). Accordingly, the respondent's motion to reopen is denied.

The following orders shall be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent's motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAUL GREGORIO MARTINEZ, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 04-72975 Agency No. A070-217-803 ORDER (Filed Sep. 8, 2009)

Before: PREGERSON, NOONAN and TROTT, Circuit Judges.

Judge Pregerson votes to grant the petition for rehearing and Judges Noonan and Trott have voted to deny the petition for rehearing. Judge Pregerson has voted to grant the petition for rehearing en banc and Judges Noonan and Trott recommend denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.